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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/522,097	01/24/2005	Elmar Kibler	3165-115	9494
6449 7590 09/10/2009 ROTHWELL, FIGG, ERNST & MANBECK, P.C. 1425 K STREET, N.W. SUITE 800 WASHINGTON, DC 20005				
EXAMINER BROWN, COURTNEY A				
ART UNIT		PAPER NUMBER		
1616				
NOTIFICATION DATE		DELIVERY MODE		
09/10/2009		ELECTRONIC		

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

PTO-PAT-Email@rfem.com

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/522,097

Applicant(s)

KIBLER ET AL.

Examiner

COURTNEY BROWN

Art Unit

1616

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 17 August 2009 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to or on the same day as filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☒ The period for reply expires 3 months from the mailing date of the final rejection.
b) ☐ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.
Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) as set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☒ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☒ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☒ will not be entered, or b) ☐ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1, 25, 26 and 30-37.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☒ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing a good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because:
See Continuation Sheet.
12. ☐ Note the attached Information Disclosure Statement(s). (PTO/SB/08) Paper No(s). _____.
13. ☐ Other: _____.

/Ernst V Arnold/
Primary Examiner, Art Unit 1616

Continuation of 11, does NOT place the application in condition for allowance because: The Arguments filed on August 17, 2009 do not place any of the claims in condition for allowance because the prior rejection mailed on April 16, 2009 still meets the limitations and the arguments are not persuasive to overcome the rejection. Applicant's reply has not overcome the Obvious Double Patenting Rejection over copending application 10/522,157 for the following reasons: Applicant argues that Component A is the same in both of the applications and component C is the same when C is a triazine and that component B is different in the two applications. Component B in the present application is clopyralid while component B in 10/522,157 is two herbicides selected from the group consisting of imazapyr, imazaquin, imazamethabenz-methyl, imazamox, imazapic and imazethapyr. Thus, Applicant contends that one skilled in the art would never expect to sustain a synergistic effect when exchanging essential components in a synergistic mixture. The Examiner disagrees with this argument because the specification of co-pending application 10/522,157 teaches the use of clopyralid (page 5, line 13) in a synergistic combination with the instant composition's component A. Further, the instant specification also teaches the use of two herbicides selected from the group including consisting of imazapyr, imazaquin, imazamethabenz-methyl, imazamox, imazapic and imazethapyr in a synergistic combination with the instant composition's component A (see page 20, lines 4-9). Therefore, it would be expected that the substitution of clopyralid for two herbicides selected from the group including consisting of imazapyr, imazaquin, imazamethabenz-methyl, imazamox, imazapic and imazethapyr as claimed in co-pending application 10/522,157, would result in a synergistic composition. Applicant's reply has not overcome the 35 USC 103 rejection for the following reasons: Applicant argues that the inventive step of the Sievernich application is based on the unexpected synergistic effect of the binary mixture comprising as component A) 4- [2- methyl-3-(4,5-dihydroisoxazol-3-yl)-4-methylsulfonyl- benzoyl]-l-methyl-5- hydroxy-lH-pyrazole) and that adding a third herbicide to a synergistic mixture would be obvious to the man skilled in the art with the expectation of obtaining a synergistic mixture with enhanced effectiveness may or may not be the case, depending on the selected compounds. Applicant argues that even a purely additive effect does not always occur just because it can be calculated. Furthermore, Applicant argues that the office action overlooks the fact that the addition of the third component, the sulfonamide or the triazine, provides not only enhanced effectiveness, i.e. an additive effect, but provides a second, additional synergistic effect which has been confirmed by experimental evidence and would not have been predictable or obvious over Sievernich. However, the Examiner disagrees with these arguments because Sievernich teaches a synergistic combination of component A with component B as well as a synergistic combination of components A and C. Further, Sievernich et al., in a further particular embodiment, teach a synergistic herbicidal mixture comprising as component A, a 3-heteroxyxyl-substituted benzoyl derivative and as component B, two herbicidal compounds (page 34, lines 42-46). Therefore, Sievernich suggests the use of a ternary synergistic herbicidal mixture. Synergy is already taught and is an expected result from these combinations. Please refer to the Final rejection, mailed on April 16, 2009 for any clarifications. Claims 1,25,26 and 30-37 remain rejected.